

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK ✓

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) No. P1300CR20081339

) Div. 6

) **MOTION TO PRECLUDE**
) **DETECTIVES PAGE AND**
) **KENNEDY FROM TESTIFYING**
) **AS EXPERTS**

MOTION

Mr. DeMocker, by and through counsel, hereby respectfully requests that this Court preclude the State from offering expert testimony from Detective Steve Page or Detective Theresa Kennedy. This motion is based on the due process clause, the Eighth Amendment and Arizona counterparts, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

Rule 15.1 requires the State in a capital case, no later than 30 days after filing a notice to seek the death penalty to provide the defendant with the names and addresses of experts who the prosecutor intends to call." See Ariz. R. Crim. P. 15.1(i). The State, until January 22, 2010, had not listed either Detective Steve Page or Detective Theresa Kennedy as an expert. The defense filed a motion to preclude officers from testifying as experts with this Court on December 18, 2009. In the motion counsel specifically moved to exclude any testimony of Detective Steve Page and testimony from any other officer who was not designated as an expert by the State. On January 4, 2010 the State responded that "[n]one of the law enforcement officers listed in Defendant's motion has been listed as an expert and the State will not seek" to offer expert opinions from them.

Hearings were held on the defense in limine motion during the week of January 12, 2010. The Court held that without prior disclosure and a hearing outside the presence of the jury, the Court does not believe that Mr. Page will be able to testify with regard to forensic examination. (Court's Minute Entry of January 14, 2010). The Court also noted that questions with respect to Detective Kennedy would depend on whether she was qualified as an expert. (Id.)

On January 22, 2010, after previously taking the position that Detective Page was not an expert, the State identified Detective Page as an expert on computer forensics and Detective Kennedy as expert in tracking. This is the first time the State has identified either of these witnesses as experts. The State has listed four other computer forensics experts, in addition to Detective Page, and one other tire track expert, in addition to Detective Kennedy.

1. The State Should Be Prohibited from Offering Expert Testimony from Detective Page.

1 The State should not be permitted to call Detective Page as an expert for at least four
2 reasons: 1) the State failed to timely disclose Detective Page as an expert, 2) the State
3 has previously disavowed Detective Page as an expert, 3) the State has four other
4 experts in this area, and 4) Detective Page is not qualified to offer expert opinions on
5 computer forensics.

6 **A. Detective Page Should Be Excluded Pursuant to Rule 15.7.**

7 The State disclosed Detective Page as a fact witness on June 5, 2009, nearly eight
8 months ago. He was not disclosed as an expert until January 22, 2010, less than three
9 and a half months prior to trial. Previously the State had indicated that Detective Page
10 would not be called as an expert and would not offer any expert opinions. The State
11 failed to timely disclose Detective Page and should now be permitted to add an expert
12 with less than three and a half months to trial.

13 The State has disclosed four other computer forensics experts from the Arizona DPS
14 Computer Forensics Unit. There is no reason that the State requires five experts on the
15 same subject matter. Any potential testimony by Detective Page would cumulative and
16 duplicative.

17 Furthermore, the State's disclosure of harddrives and other electronic data without
18 bates labeling or otherwise identifying what evidence it intends to use has substantially
19 interfered with Mr. DeMocker's ability to identify appropriate experts or prepare a
20 defense. For example, counsel requested on January 13, 2010 that the State disclose
21 Encase Case Files and EnCase Case Log Files for all electronic media and storage
22 devices, cameras and phones. The State has not produced any of these documents thus
23 far in disclosure and has not responded to the defense request. Also included in the
24 January 13, 2010 letter was a request to disclose the results of a request to of DPS noted
25 at bates number 267 to image specific items and retrieve email references to Ms.
26 Kennedy. No response has been received to this request either. In the State's disclosure
27 about what materials Mr. Echols will rely on, it provides "Emails obtained by DPS
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1 Computer Forensics Lab" without identifying any bates numbers, dates or other
2 identifying information regarding these emails. The defense does not even know if
3 these emails have been disclosed much less how to locate them in the hard-drives and
4 mountains of paper disclosure. The State's disclosure with regards to computer forensic
5 examinations and now late disclosure of a new fifth expert seriously impedes Mr.
6 DeMocker's ability to prepare his defense.

7 Rule 15.7 permits the Court to impose any sanction it finds appropriate where a
8 party violates the disclosure required under Rule 15. See Ariz. R. Crim. P. 15.7(a). A
9 trial court has broad discretion in fashioning a sanction and will not be found to have
10 abused its discretion "unless no reasonable judge would have reached the same result
11 under the circumstances." See *State v. Armstrong*, 208 Ariz. 345, 354, 93 P.3d 1061,
12 1070 (2004) (citing *State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.
13 18 (1983)). The trial court must take into account, in determining the appropriate
14 sanction, "the significance of the information not timely disclosed, the impact of
15 the sanction on the party and the victim, and the stage of the proceedings at which
16 the disclosure is ultimately made." Ariz. R. Crim. P. 15.7(a). The Rule
17 specifically contemplates exclusion use of evidence as a sanction. *Id.* (a)(1). The
18 court "must order disclosure and impose sanctions unless it finds that the failure
19 to disclose was harmless, or could not have been disclosed earlier even with due
20 diligence and the information was disclosed immediately upon discovery." See
21 *State v. Newell (Milagro)*, 221 Ariz. 112, 210 P.3d 1283 (1 CA-SA 09-0052, Court of
22 Appeals filed June 2, 2009).

23
24 **B. Detective Page Should Be Excluded Because He is Not Qualified as an**
25 **Expert in Computer Forensics.**

26 As disturbing as the late disclosure of Detective Page, is that fact that he is not
27 qualified as a computer forensics expert. Detective Page testified at the *Simpson* hearing
28 on December 23, 2008, that he had "completed several courses" in computer forensics

1 (Tr. at 137:2-7). He testified at the *Chronis* hearing that his training in this area consists
2 entirely of two courses by the "National White Collar Crime Center" and courses on
3 software used for computer examination. (Tr., 10/28/09 at 75-76) He is not qualified to
4 offer expert opinions on computer forensics. The State acknowledged as much in its
5 response to the defense motion in limine.

6 "[T]he trial court determines in each case 'whether the expertise of the witness is
7 applicable to the subject about which he offers to testify.'" *Gemstar, Ltd. v. Ernst &*
8 *Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996) (quoting *Englehart v. Jeep Corp.*,
9 122 Ariz. 256, 258, 594 P.2d 510, 512 (1979)). To qualify to testify as an expert
10 witness, the witness must possess expertise that is applicable to the subject about which
11 he intends to testify, and he must have training or experience that qualifies him to render
12 opinions which will be useful to the trier of fact. *Webb v. Omni Block, Inc.*, 216 Ariz.
13 349, 352, 166 P.3d 140, 143 (App. 2007). The party offering expert testimony must
14 show that the witness is competent to give an expert opinion on precise issue about
15 which he is asked to testify. *Gaston v. Hunter*, 121 Ariz. 33, 51, 588 P.2d 236, 344
16 (App. 1978). An expert will be excluded if he (1) has no relevant training or
17 experience, (2) does not detail the basis for his opinions and conclusions, and (3) does
18 not establish that his opinions and conclusions were based on data that was reasonably
19 relied upon by experts in field. *Holy Trinity Greek Orthodox Church v. Church Mut.*
20 *Ins. Co.*, 476 F.Supp.2d 1135, 1139 (D. Ariz. 2007) (witness did not qualify as expert,
21 for purposes of giving an affidavit in opposition to summary judgment in bad faith case
22 against property insurer regarding insurance claims handling practices).

23 Detective Page does not have expertise applicable to computer forensics and he
24 does not have training or experience that qualifies him to render opinions which will be
25 helpful to the jury. This Court should prohibit the State from offering expert testimony
26 from Detective Page.
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1 **2. The State Should be Prohibited from Offering Expert Testimony from**
2 **Detective Kennedy.**

3 Detective Kennedy was listed as a fact witness by the State on June 5, 2009. During
4 argument on January 14, 2010, the defense specifically raised Detective Kennedy's
5 anticipated testimony about shoe print comparison and objected to the State offering any
6 expert opinions from her. On January 22, 2010 the State, for the first time, disclosed
7 Detective Kennedy as a "tracking expert." The State should not be permitted to call
8 Detective Kennedy as a tracking expert. The State did not disclose her as an expert
9 until less than three and a half months before trial and Detective Kennedy is not
10 qualified as a tracking expert.

11 **A. Detective Kennedy Should be Excluded Pursuant to Rule 15.7.**

12 Detective Kennedy should not be permitted to testify as an expert under Rule 15.7
13 given the State's disclosure of her with less than three and a half months to trial. The
14 State had not previously disclosed a shoe tracking expert. The defense's ability to
15 identify, retain and work with an expert in this area is seriously hindered by the
16 extremely limited timeframe between now and trial. The proposed testimony of
17 Detective Kennedy is significant because the exculpatory photographic evidence
18 of shoe prints was not properly preserved and cannot be independently verified by
19 any defense witness or expert. The timing for the disclosure could not be worse
20 with so little time until trial. And the State, with reasonable diligence, could have
21 made this disclosure earlier. The factors under Rule 15.7 support exclusion of her
22 testimony as an expert.

23 **B. Detective Kennedy Should be Excluded Because She is Not Qualified**
24 **as an Expert in Tracking.**

25 Furthermore, Detective Kennedy is not qualified as a tracking expert. During
26 Detective Kennedy's December 2, 2009 interview she indicated that her training
27 regarding tracking consisted entirely of two one-day trainings; one training was as part
28 of the SWAT team and one was part of a "man-tracking school." Detective Kennedy

1 never received any training on preservation or impressions. She said her training was
2 "more for like when we're hunting a fugitive kind of thing. That's more of the training
3 that I had." She has no training in forensic photography. She also said that her training
4 "doesn't make me an expert." Having explained her lack of expertise, Detective
5 Kennedy went on to indicate that she had an opinion about the relative age of various
6 shoe-prints. She also opined that different sets of prints were "similar" and that all
7 of the shoe prints in a certain track were made from the same shoes. She further opined
8 as to what kind of shoe make a certain track (hiking shoe), and that a particular set of
9 shoe prints were associated with the bicycle tire tracks.

10 Detective Kennedy did not know how to operate the GPS unit she was using to
11 record her tracking. She made no effort to cast or otherwise permanently preserve any
12 of the shoeprint impressions. The State has disclosed an extensive DPS protocol that
13 describes how to preserve and photograph shoe print evidence. This protocol was
14 attached as exhibit 1 to the Defendant's Motion to Dismiss or in the Alternative for a
15 Willits Instruction filed on December 22, 2009 and incorporated herein. Detective
16 Kennedy did not follow any of these protocols.

17 Detective Kennedy is not qualified to offer expert opinions about shoe tracks.
18 She does not possess expertise in shoe comparison, photography or tracking, and she
19 does have training or experience that qualifies him to render opinions which will be
20 useful to the trier of fact. *See Webb*, 216 Ariz. at 352. As detailed previously by the
21 defense, The National Academy of Science has specifically warned about the serious
22 problems with offering juries testimony about forensic science that misrepresents the
23 significance or importance of the findings. It found that "... if the scientific evidence
24 carries a false sense of significance ... the jury or court can be misled, and this could
25 lead to wrongful conviction or exoneration. If juries lose confidence in the reliability of
26 forensic testimony, valid evidence might be discounted, and some innocent persons
27 might be convicted or guilty individuals acquitted." *See "Strengthening Forensic*
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1 Science in the United States: A Path Forward." <http://www.nap.edu/catalog/12589.html>
2 at 1-2. This Court should exclude Detective Kennedy as an expert witness.

3 **CONCLUSION**

4 Defendant Steven DeMocker, by and through counsel, hereby requests that this
5 Court prohibit the State from offering any expert testimony from either Detectives Page
6 or Detective Kennedy.

7
8 DATED this 21 day of January, 2010.

9
10 By: 

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19 **ORIGINAL** of the foregoing hand delivered for
20 filing this 21 day of January, 2010, with:

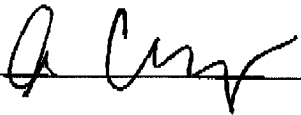
21 Jeanne Hicks
22 Clerk of the Court
23 Yavapai County Superior Court
24 120 S. Cortez
25 Prescott, AZ 86303

26 **COPIES** of the foregoing hand delivered this
27 this 21 day of January, 2010, to:

28 The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six

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3
4 Joseph C. Butner, Esq.
5 Yavapai Courthouse Box

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